



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT EMBU**

**Civil Appeal 32 of 2006**

**FRANCIS GICHOBBI MUGAI.....APPELLANT**

**VERSUS**

**PETER KIMOTHU MUGO.....RESPONDENT**

**J U D G M E N T**

In his plaint dated 26/9/2005, the plaintiff sought as against the defendant the following orders:-

- (a) ***Ksh.250,000 plus interest at the rate of 30% p.a calculated from 19/1/2005 until payment in full.***
- (b) ***Cost of the suit and interest at court rates.***

In his defence, the defendant sought for the dismissal of the whole suit. Although he did not file a counter-claim as such, he also sought for orders for the plaintiff to pay the balance of the purchase price i.e 85,000/= so that the defendant could execute the transfer of the plot in question or alternatively, that he be allowed time to refund the money already paid to him by the plaintiff.

The matter was heard before **Mr. Lorot –Resident Magistrate at Gichugu** at the end of which he rendered the Judgment dated 12/5/2006. That Judgment is the basis of this Appeal. In the Judgment, he acknowledged which was never disputed that the defendant had received the 240,000/= from the plaintiff as part of the purchase price. The magistrate made a finding that the plaintiff is the one who was responsible for the frustration of the sale agreement. He accordingly dismissed the plaintiff's suit with costs to the defendant but ordered that the defendant refunds the 240,000/= to the plaintiff. The Plaintiff was aggrieved by the said Judgment and filed this appeal relying on 4 grounds. He asks the court to set aside the said Judgment and enter Judgment for the plaintiff as prayed in the plaint. Basically therefore, the plaintiff was aggrieved because he was not awarded the costs of the suit and the interest on the money he had paid the defendant.

I have considered the evidence adduced before the trial court along with the said grounds and the submissions in court by both counsel. As stated earlier on, the defendant did not deny having received the 240,000/=. His contention is that it was the plaintiff who refused to honour his part of the bargain. He even offered to pay the money, or be paid the balance of the purchase price to enable him complete the transaction. The learned magistrate found as a fact that it was the plaintiff who had "***authored his own problems***" and that is why he dismissed the suit but ordered the defendant to refund the purchase price as he had prayed in his statement of defence.

In my considered view, the magistrate never entered Judgment for the plaintiff. He clearly stated that the plaintiff had failed to prove his case on a balance of probabilities. How then could he award him costs? or interest as prayed. His suit was dismissed. The learned magistrate could have left the matter at that but since the defendant had offered to refund the money, the magistrate decided to be magnanimous and allowed that prayer though it had not been placed before the court by way of counterclaim.

My finding is that the plaintiff's suit was properly dismissed and he was not therefore entitled to any costs or interest on the amount claimed.

This Appeal has no merit whatsoever. The same must therefore fail. I dismiss it with costs to the Respondent.

**W. KARANJA**

**JUDGE**

**3/11/2009**

Delivered, signed and dated at Embu this 3<sup>rd</sup> day of Nov 2009.

**In presence of:-Ms Munene & Wairimu for parties present.**